ABC, Inc.

DOCKET FILE COPY ORIGINAL

Roger Goodspeed
Senior General Attorney
Law & Regulation

RECEIVED
AUG 21 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 21, 1998

Hand Deliver

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Dear Ms. Salas:

On behalf of ABC, Inc., transmitted herewith for filing with the Commission are an original and six copies of its Reply Comments in MM Docket No. 98-35.

If there are any questions in connection with the foregoing, please contact the undersigned.

Very truly yours,

Roger Goodspeed

RG/ak
Enclosures

West 66th Street New York, NY 10023 6298 (212) 456-7593 Fax (212) 456-6202
E-Mail goodspr@abc.com

No. of Copies rec'd 0+6
List ABCDE

RECEIVED

AUG 21 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of the Commission's Broadcast	)	MM Docket No. 98-35
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	

REPLY COMMENTS OF ABC, INC.

Alan N. Braverman
Senior Vice President & General Counsel

Sam Antar
Vice President, Law & Regulation

Roger C. Goodspeed
Senior General Attorney, Law & Regulation

ABC, Inc.
77 West 66th Street
New York, New York 10023

Counsel for ABC, Inc.

August 21, 1998

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)))))))	MM Docket No. 98-35

To: The Commission

REPLY COMMENTS OF ABC, INC.

In these Reply Comments, we will respond to the comments filed in this proceeding concerning the UHF discount by the Association of Local Television Stations, Inc. ("ALTV"), the National Association of Broadcasters ("NAB") and Paxson Communications Corporation ("Paxson") and to comments filed in this proceeding concerning the national television ownership rule by the Network Affiliated Stations Alliance ("NASA").

I. The Commission Should Eliminate the UHF Discount

In our opening comments, we showed that for purposes of applying the national ownership cap, a 50% UHF discount was adopted in 1985 because of the "inherent physical limitations" of the UHF service compared to VHF.[1] Even at the time of its adoption,

[1]Mem. Opinion and Order, 100 FCC 2d 72, 57 RR 2d 966 (1985) ("1985 Ownership Reconsideration Order"), pars. 36-40. See Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221, 87-

however, there was no empirical evidence to support the 50% figure.[2] Whatever the merits of adopting a "discount" without empirical support in 1985, maintaining such a discount today cannot be sustained in the face of the record before the Commission and the sweeping changes in video distribution that have occurred over the past decade. For that reason, ABC proposes that the Commission eliminate the discount. Such a result would follow if, as ABC urges, the Commission eliminates the national ownership cap in its entirety. If the Commission elects to retain some television ownership cap, then it should also abandon the 50% UHF discount because it is arbitrary and unwarranted based on current marketplace facts.

As we show below, the contrary arguments made by ALTV, NAB and Paxson in their opening comments in this proceeding fail to support retention of the UHF discount. The statistical studies offered by these commenters show at best that there is a "gap" between average UHF and VHF station performance. But the averaging ignores variations in station operations and program quality and obscures the high ratings on many UHF stations. The studies fail to make the critical showing that any "gap" between UHF and VHF station performance is caused by a signal-propagation disadvantage suffered by UHF stations. More significantly, the studies fail to

---

8, 10 FCC Rcd 3524 (1995) ("1995 Further Ownership Notice") par. 102 ("The Commission incorporated this [50% UHF discount] in the 1984 rules to account for the physical limitations of the UHF signal.").

[2] See Comments of ABC, Inc., MM Docket No. 98-35 (filed July 21, 1998) ("ABC Comments") at 18-21.

acknowledge that the critical factor in station performance is not its signal propagation but the popularity of its programs. We will show in these comments that UHF stations that offer popular programming can be fully competitive with, and can even regularly generate higher ratings than, VHF stations.

We respond below to the various arguments offered in support of the UHF discount.

A. The Telecommunications Act of 1996 ("Telecom Act") Does Not Compel Retention of the UHF Discount; Rather, the Telecom Act Requires the Commission to Review the UHF Discount and to Repeal or Modify It If It Is No Longer in the Public Interest

ALTV argues that the Telecom Act compels retention of UHF discount because by increasing the national audience cap Congress intended that the method for calculating the cap, including the discount, would remain the same.[3] But that unfounded inference is rebutted by the plain language of the Telecom Act. In that law, Congress requires that the Commission shall review on biennial basis, without qualification, "all of its ownership rules."[4] It provides no exception for the UHF discount, which is clearly one of the Commission's ownership rules which, like all ownership rules, must be reviewed and modified or repealed if it is no longer in the public interest.

Indeed prior to the enactment of the Telecom Act, the

---

[3]See Comments of Association of Local Television Stations, Inc., MM Docket No. 98-35 (filed July 21, 1998) ("ALTV Comments") at 2-3.

[4]Telecom Act, see. 202 (h).

Commission had already initiated an inquiry into whether to retain the UHF discount in view of improved UHF reception equipment and increased cable penetration.[5] Had Congress intended to stay the Commission's hand in making any change in the UHF discount, it would have done so explicitly. Congress did not instruct the Commission to suspend that pending proceeding or express a view on the issue in the Telecom Act. The only logical conclusion to be drawn is that the Commission remains free to eliminate or reduce the discount pursuant to its broad grant of delegated authority under Section 303 of the Communications Act.

ALTV's contrary interpretation would lead to the absurd result that the Commission would be prevented from adapting its regulations to new marketplace facts and new technology because of the failure of Congress to specifically direct the FCC to reconsider a particular regulation. For example, if a new or improved method for estimating national audience were developed, the FCC would be powerless to adopt the new methodology absent a specific Congressional direction that it does so. This approach fundamentally misconstrues the role of expert agencies and the broad authority delegated to the FCC by the Communications Act. Unless Congress explicitly provides otherwise -- and it has not done so in this case -- the Commission has the discretion to act within the full scope of its delegated authority to reconsider any

[5]See Further Ownership Notice, par. 102; Order, FCC 96-91, 2 CR 363 (1996), par. 4 (in order adopting 35% cap by direction of Telecom Act, noting "UHF discount... presently under consideration in the Commission's outstanding proceeding reviewing its television ownership rules").

rule. Indeed, in this instance, Congress has expressly directed the Commission to exercise that discretion to review and reconsider precisely the sort of rule here at issue.

B. An Asserted Absence of Cable Carriage of Some UHF Stations in Some Markets Does Not Justify an Across-the-Board 50% Discount

ALTV argues that cable carriage has not eliminated the need for the UHF discount because it "has not necessarily increased the audience reach of local UHF stations."[6] ALTV asserts (without citing any statistics or studies) that, despite must carry, some UHF stations are not carried on cable systems or are not carried on all systems throughout their coverage areas as the result of waivers granted to cable systems or because they do not supply an adequate signal to the cable system's headend.

The most that can be said for ALTV's argument is that it shows that some UHF stations in some markets may not have achieved the full benefit of the equalization to VHF as a result of cable carriage. But without any proof of the degree to which UHF stations are not carried on cable compared to VHF stations, ALTV's argument plainly does not warrant retention of an across-the-board discount in every market throughout the country, let alone a discount at the 50% level.

Paxson argues that the 50% UHF discount should be retained because cable penetration is roughly 65% nationwide and about 75%

---

[6] ALTV Comments at 18.

in the five largest television markets.[7] That argument, of course, relies on the hypothesis that all non-cable homes cannot receive a UHF signal. There are two flaws with that hypothesis. First, it is entirely unsubstantiated -- Paxson makes no effort to show how many non-cable homes cannot in fact receive over-the-air UHF signals. Indeed, simple logic suggests that many of those homes do not subscribe to cable because they can receive local broadcast signals. Second, as we pointed out in our opening comments, even making the assumption that half of non-cable homes cannot receive some UHF stations over the air, the justifiable UHF handicap based on signal propagation would be no more than about 17%.[8] And because we believe that improvements in UHF reception likely allow more than half of non-cable homes to receive those signals, even that percentage is substantially overstated.

C. The Pending DTV Conversion Does Not Justify Maintaining the UHF Discount

ALTV argues that the advent of DTV makes the case for the UHF discount more compelling. According to ALTV, this is because of two factors that will be present during the transition period: (1) UHF analog coverage problems will increase as the result of squeezing the new DTV stations into the existing broadcast band

[7]Comments of Paxson Communications Corporation, MM Docket No. 98-35 (filed July 21, 1998) ("Paxson Comments") at 7-8. In its recent report on the video marketplace, the Commission cites a national cable penetration of 68%. Fourth Annual Report, CS Docket No. 97-141, released Jan. 13, 1998 ("1997 Video Rep.") par. 15.

[8]See ABC Comments at 19-20.

which is likely to cause increased interference, and (2) there is no guarantee that the FCC will mandate digital must carry.

While it is true that the transition to DTV will be both complex and difficult, the DTV transition has limited relevance to the UHF handicap issue and should not cause the Commission to delay action. The two transition period factors ALTV cites apply equally to VHF stations and UHF stations and will not add to any remaining UHF handicap. VHF analog stations will also experience increased interference as the result of the squeezing of the new DTV channels into the broadcast band and VHF stations face the same uncertainty concerning digital must carry.

ALTV also argues that after the transition period, the current UHF/VHF disparity will remain as the result of the FCC's "replication" principle. ALTV argues that "replication" has created two classes of UHF DTV stations and that the discount should continue to be afforded to U/U stations.[9] But once again the DTV "overlay" adds nothing to this analysis. First, the replication argument is overstated. As ALTV well knows, the Commission, at ALTV's own urging, has adopted a number of suggestions including power level adjustments to increase U/U penetration. But more to the point, extending the discount in a DTV world would make sense only if replication was perpetuating a sufficiently demonstrable disadvantage in the analog world to justify a 50% discount in the first instance. As we have demonstrated in our comments and this Reply, there is no such demonstrable disadvantage.

[9]ALTV Comments at 15-16.

D. Ratings and Financial Studies Fail To Show UHF Stations Cannot Compete Equally With VHF Stations Because of Signal Propagation Deficiencies

ALTV and NAB offer several ratings and financial studies purporting to show that despite cable carriage, there is still a "gap" between UHF and VHF station performance.[10] Without taking issue with the accuracy of those studies, they prove at most merely that, if station performance is averaged, UHF stations perform at lower levels of ratings and revenues than VHF stations. But this use of averaging ignores the variations among stations and obscures the high ratings of many UHF stations. Even more important, the studies do not prove that the lesser performance is caused by the lesser reach and strength of UHF stations' signals. As we will show below, the most important factor that differentiates stations in ratings and performance is not signal propagation, but the popularity of the programming offered; a relationship that is given short shrift by the ALTV and NAB studies.

If, as ALTV and NAB claim, UHF stations simply cannot compete on an equal basis with VHF stations because of signal deficiencies, then one would expect to find few, if any, UHF stations outperforming VHF stations in head-to-head programming match-ups. However, the opposite is the case. What the data shows is that UHF stations are fully competitive with VHF stations when offering programming of competitive quality. In the May 1998 sweep period, for example, Fox was able to achieve higher prime-time household

[10] See ALTV Comments at 20-27; Comments of National Association of Broadcasters, MM Docket No. 98-35 (filed July 21, 1998) ("NAB Comments") at 12-13.

ratings than ABC and CBS in the key Adult 18-49 demographic despite the fact that Fox's affiliate system is predominantly composed of UHF stations, while ABC and CBS have predominantly VHF affiliates. Fox's prime-time ratings were 5.0, while ABC had 4.4 and CBS had 3.8.[11]

Other examples abound. In May 1998 Fox's program "X-Files" broadcast on UHF affiliates in five major markets -- Boston, Houston, Denver, Pittsburgh and Sacramento -- not only outperformed the program's national ratings for Adults 18-49, but also beat <u>three</u> VHF stations in each of the five markets.[12] The same pattern can also be seen at UHF stations affiliated with NBC and ABC. For example, in markets as diverse as San Diego, Hartford, Kansas City, Dayton, Flint and Toledo, NBC's May 1998 broadcasts of "Friends" on UHF affiliates soundly defeated the competing ABC, CBS and Fox programs broadcast on VHF affiliates for Adults 18-49.[13] Similarly, in the same sweep period in several markets ABC's "Dharma & Greg" on UHF stations generated higher Adult 18-49 ratings that all other network programs in the same time period broadcast on VHF stations. In fact, the only program in those markets that beat "Dharma & Greg"

---

[11]Nielsen, NTI, 4/23/98 - 5/20/98. Fox has 41% VHF/55% UHF stations. ABC has 78% VHF/20% UHF, and CBS has 84% VHF/14% UHF. NSI, Reported Affiliated Stations, May 1998 Survey. <u>See</u> table attached hereto as Exhibit A.

[12]The national Adult 18-49 rating for "X-Files" was 9.7. The local ratings were: Boston 15.0; Houston 10.8; Denver 15.6; Pittsburgh 10.4; Sacramento 17.7. Nielsen, NTI, NSI May 1998 Survey (4/23/98-5/20/98). <u>See</u> table attached hereto as Exhibit B.

[13]<u>See</u> table attached hereto as Exhibit C.

was broadcast by Fox on a UHF affiliate.[14]

The same applies to non-network programming: strong shows succeed on UHF stations. Three of the top four syndicated programs in May 1998 -- "Oprah," "Wheel of Fortune," and "Jeopardy" -- are broadcast predominantly on VHF stations. Their success is not, however, because they are on VHF stations. The third and fourth rated syndicated programs in May 1998, "Jerry Springer" and "Seinfeld" respectively were broadcast primarily on UHF stations:[15]

	Total # Stations	VHF	UHF	% VHF
#1 Wheel	197	156	41	79%
#2 Jeopardy	192	149	43	78%
#3 Springer	164	53	111	32%
#4 Seinfeld	203	89	114	44%
#5 Oprah	202	166	36	82%

ALTV's Table 3 purports to show that, sign-on to sign-off, the household ratings for network-affiliated stations decreased when the network affiliation was switched from a VHF station to a UHF station in the same market.[16] ALTV assumes that the loss in viewership was caused by a diminished signal coverage by the UHF station. But analysis of other switch markets shows it is the

[14]See table attached hereto as Exhibit D.

[15]Nielsen NSI, May 1998. During the same sweep period, the "Jerry Springer" broadcast on a UHF station outrated all VHF stations in its time period in Nashville, New Orleans, Rochester and Savannah. "Seinfeld" did the same in Sacramento, San Diego, San Antonio and Augusta. See tables attached hereto as Exhibits E-G.

[16]ALTV Comments at 23.

quality of the local programming on the new affiliate -- often a station with little or no local news presence and weak syndicated fare -- that accounts for substantial ratings losses.

Between 1994 and 1995 CBS switched from one VHF station to another VHF station in Dallas and Seattle. Except in one daypart at one station, household ratings for daytime, network news and primetime were lower on the new VHF station.[17] In several dayparts the ratings loss exceeded the losses cited by ALTV for VHF and UHF switches.[18] That experience in a UHF to VHF switch strongly suggests that viewer disruption caused by the switch or other non-technical factors such as loss of strong lead-ins for network programs or absence of popular local news programming -- rather than diminished signal strength -- causes ratings losses in switch markets.

Even when Fox switched from a UHF to a VHF station -- which according to ALTV's theory should produce substantially increased ratings -- the stations' ratings stayed essentially flat. In five major markets (Dallas, Atlanta, Phoenix, Milwaukee and New Orleans) Fox generated household ratings increases of only 4 to 10%, and suffered Adult 18-49 ratings <u>decreases</u> from 3% to 11%, by switching from a UHF to a VHF station.[19]

The switch market data show that reduced ratings in a VHF to

---

[17]Household ratings for daytime in Dallas went up slightly after the switch. <u>See</u> table attached hereto as Exhibit H.

[18]<u>See</u> ALTV Comments at 23, Table 3.

[19]<u>See</u> table attached hereto as Exhibit I.

UHF switch are largely determined by the strength of the local news franchise, and the popularity of programming offered during the access period and other periods of the day not programmed by the network, at the stations involved. Thus, in the CBS VHF to VHF switches cited above, the network moved to formerly independent VHF stations with no local news programming. Without a strong news lead-in, the CBS network evening news suffered household ratings losses of over 60% after the switch.[20] Referring again back to the May 1998 sweep period, although the Fox network of mostly UHF stations achieved higher Adult 18-49 ratings than ABC and CBS in prime time, Fox had lower ratings sign-on to sign-off (6:00 AM - 2:00 AM) than the other two networks: ABC, 2.0; CBS, 1.7; Fox, 1.5.[21] The only logical explanation for this phenomenon has to be differences in the popularity of programming offered outside prime time. A propagation handicap is not something that occurs only during network news or outside of the prime time hours. The ALTV switch-market study is unpersuasive because it fails to take account of the effect of variations in the popularity local station programming leading into the measured time periods (8-9 PM Eastern and Pacific, 7-8 PM Central and Mountain.[22]

---

[20]See Exhibit H hereto.

[21]Nielsen, NTI, 4/23/98 - 5/20/98. Of the 173 Fox affiliates, only 27 of them -- covering 19.5% of the country -- offer an early evening local news. Nielsen, NSI, May 1998 Survey.

[22]Another ALTV ratings study compares all-day ratings of new UHF affiliated stations with the all-day ratings of the former VHF affiliate in network "switch" markets (ALTV Comments at 22, Table 3). But that comparison is likewise flawed because it

Further dramatic evidence of UHF stations' ability to generate competitive ratings is shown by the switch of NFL football from CBS to Fox between 1993 and 1994. In four of the five largest television markets where Fox has a UHF affiliate, the Fox broadcast of NFL football in 1994 rated higher than the previous year's NFL broadcast on a CBS VHF station; in the fifth market Fox's rating came within a tenth of a point of the previous rating:[23]

Ratings Men 18+

	Chicago	Philadelphia	Boston	Houston	Minneapolis
Nov. `93					
CBS	16.3	22.9	8.5	13.5	19.5
Nov. `94					
Fox	30.0	26.6	8.4	14.0	22.8

In sum, the ratings data tends to disprove rather than support the case for a UHF discount. When a UHF station carries programming viewers want to watch, they are fully competitive with UHF stations on ratings.

Both ALTV and NAB also attempt to base their case for retention of the 50% discount on studies which compare the relative

---

takes no account of differences in syndicated programming and local news between the old VHF affiliates and the new UHF affiliates.

[23]NTI, NSI, survey periods as dated. Local market data based on games running during November sweep periods. Game matchups vary from year to year. *See* table attached hereto as Exhibit J.

financial performance of VHF and UHF stations.[24] But such studies -- using station-blind aggregated data -- suffer from the same defects as the ratings studies already discussed. First, the averaging methodology ignores station-by-station variations and obscures the performance of financially successful UHF stations. Second, the studies fail to account for financial performance differences that are attributable to the popularity of local and syndicated programming. As we have shown, a UHF station that makes a substantial investment in popular programming and is committed to local news can meet or exceed the ratings performance of VHF stations. Ratings performance inevitably transforms into superior financial performance as well.

E. If the Commission Eliminates or Reduces the UHF Discount, It Should Not Grandfather Existing Interests

As we said in our opening comments, grandfathering is an issue only if, contrary to our view that the national ownership cap should be eliminated, the Commission elects to maintain a national cap at some level. We also pointed out that the effect of a decision to grandfather would be to give the Fox and Paxson networks an unfair competitive advantage over other networks -- a higher level of guaranteed network circulation.

Paxson argues in its comments that a decision not to grandfather would be a "retroactive rule" in violation of the Constitution and the Administrative Procedure Act because the

---

[24] ALTV Comments, Exhibit D; NAB Comments, Appendix D.

Commission has not previously "suggested" that divestitures might be required.[25] The complete answer to Paxson is that the Commission did much more than merely "suggest" that divestitures might be required. Indeed, in its March 8, 1996 order to implement the changes in the national ownership rule mandated by the Telecom Act, the Commission issued an explicit warning that "any entity which acquires stations during this interim period [i.e., prior to the outcome of the television ownership proceeding] and which complies with the 35% audience reach limitation only by virtue of [the UHF discount] will be subject to the outcome in the pending television ownership proceeding."[26] Paxson (as well as Fox) acquired the additional stations that, absent the UHF discount, would have put it over the current 35% cap after March 8, 1996.

A decision not to grandfather would not "interfere with the legally induced, settled expectations of private parties," as Paxson asserts. Indeed, in the face of the Commission's explicit warning, any expectation on the part of Paxson that divestitures might not ultimately be required can best be characterized as a commercial gamble to gain competitive advantage.

Paxson's argument that a decision not to grandfather would harm the development of the Paxson network does not change the equation. Given the number of networks that now exist, there is no sound public policy reason to confer a regulatory-based advantage

---

[25]Paxson Comments at 20-27.

[26]Order, FCC 96-91, 2 CR 363 (released March 8, 1996), par. 4.

on one group owner to the disadvantage of all others. Particularly in this context, where the Commission may be changing an ownership rule of general applicability, there is no justification to grant an exemption to parties who were on full notice that such a change was actively under consideration.

II. Elimination of the National Ownership Rule Would Not Result in Network Power Over Affiliates and Would Not Adversely Affect Localism

In our opening comments, we argued that the national ownership cap should be eliminated or, at minimum, raised to 50%. NASA argues that relaxation of the current 35% coverage cap on national ownership would unduly enhance the power networks have over their affiliated stations and that as a result, "localism" -- an affiliate's ability to program local broadcasts rather than national network programming -- will be reduced.[27] The argument is utterly without merit.

NASA hypothesizes that allowing networks to own television stations covering a greater proportion of the country would somehow empower networks to limit affiliates in broadcasting locally-oriented programming. The hypothesis itself is based on a characterization of the network-affiliate relationship that is demonstrably false.

To start with, NASA's hypothesis rests on an utterly distorted image of a constant battle, time-period by time-period, in which

---

[27]Comments of Network Affiliated Stations Alliance, MM Docket No. 98-35 (filed July 21, 1998) ("NASA Comments") at 11-12.

networks apply unrelenting pressures for uniform national programming while affiliates bravely resist to preserve local programming. In actuality, the networks program certain dayparts, which are cleared by most affiliates, and affiliates program other dayparts, to which the networks make no claim and which provide affiliates ample opportunity to present local news and public affairs without preempting network programs.[28] It is instructive in this regard to look at the trend line of the number of network-programmed hours, which has declined over time. Over the course of the last 20 years, ABC, CBS and NBC collectively offered 25 fewer hours per week of network programming to their affiliates. This demonstrates that when affiliates refuse to support a network program they can and have made that refusal stick and have reclaimed time periods from the network.[29]

NASA's suggestion that "networks can exercise significant power over affiliates" and that affiliates "have no more leverage

---

[28]In fact, the networks offer programming for roughly only one-half to two-thirds of each affiliates' broadcast day on average, depending on the total number hours of station operation. In 1994, the three major networks programmed an average of 84.5 hours each week of a total (24 hours x 7 days) 168 hours available, or about 50%. The average in 1998 for the three networks is roughly 86.5 hours each week, or about 51% of total hours available. See An Economic Analysis of the Prime Time Access Rule filed Mar. 7, 1995 by Economists Incorporated in Review of the Prime Time Access Rule, MM Docket No. 94-123, Appendix D, Table D-2 (the "EI PTAR Analysis); Nielsen, NTI. Nielsen Television Index.

[29]See EI PTAR Analysis at 23, Appendix D. See also Report & Order, 100 FCC 2d 17, 56 RR 2d 859 (1984), par. 99 ("We do not believe that network ownership would result in stations' refusing to transmit programming of intense local interest in order to clear a less desirable part of the network feed.").

today than in years past... to lessen network control over programming decisions" likewise distorts reality.[30] The dominant story in the broadcast television industry since 1994 has been the unprecedented exercise of affiliates' power in switching network affiliations and negotiating for substantially higher compensation for clearing network programming. Since 1994, scores of television stations have changed their network affiliation, many of them shifting from one of the original three networks to Fox.[31] During the same period, the original three networks increased the total annual compensation paid to their affiliates by an estimated $150 to $200 million.[32] In recent years two new players, the United Paramount Network and WB Television, and more recently a third, PAXTV, have joined ABC, CBS, Fox and NBC in competition for affiliated stations around the country.[33] As Paxson points out in

---

[30] NASA Comments at 5.

[31] Zier, Fog of War Engulfs Affiliation Battles, Broadcasting & Cable, Dec. 5, 1994, at 50-56.

[32] Jensen, Scrambled Picture - Many TV Stations Switch Networks, Confusing Viewers, Wall Street Journal, Oct. 7, 1994; CBS's Tony Malara: In the Storm of the Eye, Broadcasting & Cable, Dec. 19, 1994, at 34. See also Lafayette, Struggle for Affiliates Still Fierce, Electronic Media, May 15, 1995, at 32 ("competition among the networks for affiliates remains intense"); Olgeirson, TV Stations Rotate Around the Dial, Denver Business Journal, Feb. 17, 1995, at D12 (Denver station manager commenting on 3-station affiliation switch "believes all three stations will come out ahead on compensation because of increased bargaining power among affiliates").

[33] EI PTAR Analysis at 15-16. In comments filed on June 12, 1995 in the Inquiry into Fox Television Stations, Inc., at 2, Hubbard Broadcasting -- owner of eight stations affiliated with ABC or NBC -- makes note of the increased competition among networks for affiliates and concludes that "the existence of the fourth network has required the other networks to strengthen

its comments, competition among ABC, CBS, NBC and Fox for affiliates was already "fierce" and the "stakes increased with the launch of the UPN and WB networks in 1995."[34]

NASA refers to a 1995 economic study by National Economic Research Associates, Inc.[35] to bolster its claim that -- despite the $150 to $200 million in increased annual compensation affiliates have gained from the networks in recent negotiations -- affiliates have little bargaining power with the networks.[36] NASA submitted the same study to the Commission in the 1995 network-rule proceeding.[37] In ABC's reply comments in that proceeding, we showed that the NERA Study fails to support its thesis that affiliates lack bargaining power with networks, and that the study ignored countervailing evidence showing a dramatic shift in bargaining power in favor of affiliates.[38] We have attached a copy of the relevant portion of those reply comments hereto as Exhibit K.

---

their relationships with their affiliates and pay greater attention to the interests of those affiliates."

[34]Paxson Comments at 18.

[35]Beutel, Kitt & McLaughlin, "Broadcast Television Networks and Affiliates: Economic Conditions and Relationship - 1980 and Today," (Oct. 27, 1995), Exhibit to NASA Comments ("NERA study").

[36]NASA Comments at 5-6.

[37]MM Docket No. 95-92.

[38]Reply Comments of Capital Cities/ABC, Inc. (filed Nov. 22, 1995) in MM Docket No. 95-92. In one of its more stunning analytical shortcomings, the NERA Study compared affiliate compensation from 1980 to 1993, but brushed off the $150 to $200 million increase in affiliate compensation that began in 1994, saying it "would not put affiliates in a better position today after accounting for inflation." NERA Study at 10.

But perhaps most fundamentally, NASA's hypothesis ignores the fact that affiliates clear programming not because they are forced to but because they recognize that high clearance levels are necessary for their own success -- if, as a group, they did not clear, the networks would fail and they would be competitively outmatched by network-quality programs on competing stations in their markets. It is for that reason that clearance levels are high and have always been high, particularly in prime time.[39]

Nor is there any basis for concluding that increasing the ownership cap will somehow undermine efforts of stations to be responsive to the needs of their communities. The network/affiliate relationship remains governed by the Commission's "right to reject" rule.[40]

In sum, affiliates are not unwilling captives of network masters. They are, in fact, willing and independent economic actors whose own welfare also depends upon the clearances that NASA suggests are being forced upon them. The premium prices affiliates stations command in the marketplace are a function of the success of network-affiliate cooperation.

---

[39] See EI PTAR Analysis at 90.

[40] 47 C.F.R. 73.658(e).

Finally, NASA suggests that the networks will somehow need non-owned affiliates less if they own more stations. But that premise is plainly false. The network business is based on the ability to deliver to national advertisers a mass audience that covers all or substantially all markets. As a result, a network cannot afford to ignore markets in which it does not own a station. In fact, in the face of new competition from Fox and the emerging networks, all of the networks have been pursuing such a strategy of shoring up circulation through long-term contracts. If NASA was right, once a network obtained stable affiliations in major markets, it would have little interest in maintaining smaller-market affiliations. Instead, far from disregarding the small markets, the networks continue to pursue long-term deals and offer increased compensation in those markets.[41]

In short, networks and affiliates need each other. There is no case for the view that affiliates need Commission protection against presumed network market power.

III. <u>Elimination of the National Ownership Rule Is Not Barred By The Telecom Act</u>

NASA also argues that eliminating or increasing the national audience cap would violate the intent of Congress. In essence, the argument is that when Congress acted in the Telecom Act to mandate that the cap be raised from 25% to 35% it meant that the cap should

---

[41] <u>See</u> Lafayette, <u>Struggle for Affiliates Still Fierce</u>, <u>Electronic Media</u>, May 15, 1995, at 32.

be permanently set at that level.[42]

NASA weaves its intent argument with selective citations to the statements of particular members of Congress during the floor debate of various versions of the Act. While these quotations may indeed represent the views of the members quoted with respect to the version of the legislation being debated as the time, they do not constitute evidence of the intent of the Congress as a whole with respect to the Act that finally became law.

The best evidence of Congressional intent in enacting the Telecom Act of 1996 is the language of the statute itself as elucidated by the Conference Report which accompanied its passage.[43] Thus, Section 202(h) of the Telecom Act requires the Commission to review "its rules adopted pursuant to this section," which includes the national cap, and "repeal or modify any regulation it determines to be no longer in the public interest." The Conference Report makes it plain that in its biennial review, "the Commission shall determine whether any of it ownership rules, <u>including those adopted pursuant to this section</u>, are necessary in the public interest as the result of competition.[44]

---

[42]NASA Comments at 7-10.

[43]<u>See</u> <u>West Va. Univ. Hosp. v. Casey</u>, 499 U.S. 83, 98-99 (1991) ("best evidence of [Congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President"); <u>Demarest v. Manspeaker</u>, 498 U.S. 184, 190 (1991) (same).

[44]H.R. Rep. 104-458, 104th Cong., 2d Sess. (1996), at 163 (emphasis added).